In the

OBERLIN M. CARTER, Survivor, &c.,

Appellant and Plaintiff in Error,

against

BENJAMIN K. ROBERTS,

Respondent and Defendant in Error.

Brief for Appellant and Plaintiff in Error in Opposition to Motion to Dismiss or Affirm.

ABRAM J. ROSE,

Attorney and Counsel for the Appellant and Plaintiff in Error.

BENJAMIN F. TRACY,

Of Counsel.

HAMILTON PRINT, 12 SPRUCE STREET, N. Y. TELEPHONE, 2870 JOHN.

Supreme Court of the United States.

OCTOBER TERM, 1899,

No. 570.

OBERLIN M. CARTER, on the Petition of ABRAM J. ROSE,

Plaintiff in Error,

against

BENJAMIN K. ROBERTS,

Defendant in Error.

Appeal from, and in error to, the Circuit Court of the United States for the Southern District of New York.

Brief for Appellant and Plaintiff in Error in Opposition to Motion to Dismiss or Affirm.

STATEMENT.

The charges and specifications preferred against Captain Carter, of which he was found guilty by Court-Martial, are as follows:

"CHARGE 1. CONSPIRING TO DEFRAUD THE UNITED STATES IN VIOLATION OF THE 60TH ARTICLE OF WAR."

"Specification II.—In that Captain O. M. Carter, Corps of Engineers, United States

Army, devising and intending to defraud the United States and to aid The Atlantic Contracting Company, a corporation, and John F. Gaynor, William T. Gaynor, Edward H. Gaynor and Anson M. Bangs, and divers other persons, all of whom were likewise with him, the said Carter, devising and intending to defraud the United States, did, with the corporation and persons named, unlawfully combine and conspire to defraud the United States of divers large sums of money, by aiding the said The Atlantic Contracting Company to obtain the allowance and payment of certain false and fraudulent claims, hereinafter described; and in pursuance of the said conspiracy, the said O. M. Carter, in the months of June, July, August, September and October, 1896, being an officer of the United States, in local charge of the river and harbor district, usually called the Savannah District, and of the improvements by the United States of rivers and harbors in said district, did, with the knowledge and consent of the said other parties named, so advertise for proposals for contracts for certain works of improvements in the Harbor of Savannah, Georgia, in said district, and so manage and conduct said advertising, and the matter of giving out information in regard to the contract to be let, and the matter of receiving proposals and awarding the contract, as to enable the said The Atlantic Contracting Company to secure the contract for said work, and to have the same entered into by the United States with it October 8th, 1896. And in further pursuance of the said conspiracy, the said The Atlantic Contracting Company, afterwards, to wit, from about the 8th day of October, 1896, to July 31st, 1897, did furnish and put into said work certain mattresses, stone and

other material which were different in kind and character from the mattresses, stone and other material contracted for in said contract, and very much less costly to the said The Atlantic Contracting Company, as well as of less value to the United States; which said mattresses, stone and other material so furnished and put into the work, the said Captain Carter, in further pursuance of said conspiracy, did receive and accept, and cause to be received and accepted, for the United States, as and for the mattresses, stone and other material contracted for; and did, on or about July 6th, 1897, cause to be paid out of the moneys of the United States $230,749.90 to the said The Atlantic Contracting Company, on account of the said furnishing and delivery of the same, and as if the said mattresses, stone and other material had been such as were stipulated for in the contract, and at the same rate, cost and price as if they had been. And in further pursuance of the said conspiracy, the said Captain Carter, about June, July, August, September and October, 1896, did advertise for proposals for a contract for improving Cumberland Sound, Georgia, in said river and harbor district, and did so manage and conduct the matter of such advertising, and the matter of giving out information in regard to the contract to be let, and the matter of receiving proposals and awarding the contract, as to enable the said The Atlantic Contracting Company to secure the contract for said work and to have the same entered into by the United States with it October 8th, 1896. And in further pursuance of the said conspiracy, the said The Atlantic Contracting Company, from about the 8th day of October, 1896, to the 31st day of July, 1897, did furnish and put into said work certain

mattresses, stone and other material which were different in kind and character from the mattresses, stone and other material contracted for in said contract, and very much less costly to the said The Atlantic Contracting Company, as well as of less value to the United States; which said mattresses, stone and other material so furnished and put into the work, the said Captain Carter, in further pursuance of said conspiracy, did receive and accept, and cause to be received and accepted, for the United States as and for the mattresses, stone and other material contracted for; and did, on or about July 6th, 1897, cause to be paid out of the moneys of the United States $345,000 to the said The Atlantic Contracting Company on account of the said furnishing and delivery of the same, and as if the said mattresses, stone and other material had been such as were stipulated for in the contract, and at the same rate, cost and price as if they had been. This on the 6th day of June, 1896, and thereafter to the 1st day of August, 1897."

CHARGE 2. "CAUSING FALSE AND FRAUDULENT CLAIMS TO BE MADE AGAINST THE UNITED STATES, IN VIOLATION OF THE 60TH ARTICLE OF WAR."

Specification VI.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being at the time the officer in local charge of river and harbor improvements, in the Savannah river and harbor district, did cause to be made certain false and fraudulent claims against the United States and in favor of The Atlantic Contracting Company, a corporation, knowing the same to be false and fraudulent, to wit, the claim represented in the following voucher submitted by the said Captain Carter, with his accounts, and

marked 'Appropriation for Improving Harbor at Savannah, Georgia.'

Voucher No. 8, $230,749.90, July, 1897,

and the claim represented by the following voucher, submitted by said Captain Carter, with his accounts, and marked 'Appropriation for Improving Cumberland Sound, Georgia and Florida.'

Voucher No. 9, $345,000, July, 1897,

which said false and fraudulent claims the said Captain Carter caused to be made by knowingly permitting the said The Atlantic Contracting Company, which had previously entered into contracts, dated October 8th, 1896, to furnish the United States certain mattresses, stone and other material of specified kinds and qualities for constructing works in said river and harbor district, to furnish and put into said works mattresses, stone and other materials different from, inferior to, cheaper and of less value to the United States than those contracted for; and by receiving and accepting and paying for the same as of the kinds and qualities contracted for, and by falsely certifying to the correctness of the said vouchers, well knowing that the mattresses, stone and other material charged for in said vouchers as having been furnished, had not in fact been furnished; each of the said claims having been made in or about the month named in the above description of the voucher relating to it."

CHARGE 3. "CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN, IN VIOLATION OF THE 61ST ARTICLE OF WAR."

Specification II.—"In that Captain Oberlin M. Carter, Corps of Engineers, United States

Army, being the officer in local charge for the United States of river and harbor improvements in the Savannah river and harbor district, did wilfully and knowingly cause the following amounts to be paid out of the moneys of the United States, subject to his order and control as officer in charge of said improvements, to The Atlantic Contracting Company, a corporation; the accounts on which the same were paid being false, and the amounts paid not being due or owing from the United States to the said Company, or to any one, and he, the said Captain Carter, well knowing this to be the case; the said accounts and amounts paid and the payments being those designated by the following voucher (and the entries therein and endorsements thereon) submitted by the said Captain Carter with his accounts and marked 'Appropriation for Improving Harbor at Savannah, Georgia.'"

Voucher No. 8, $230,749.90, July, 1897.

"And the one indicated and designated by the following voucher (and the entries therein and endorsements thereon) submitted by the said Captain Carter with his accounts and marked 'Appropriation for Improving Cumberland Sound, Georgia and Florida.'"

Voucher No. 9, $345,000, July, 1897.

"Each of the said payments having been caused to be made on or about July 6th, 1897, by the said Captain Carter drawing and delivering a check, as such officer in charge of river and harbor improvements, by which the payment was ordered and directed to be made out of moneys of the United States under his control as such officer."

CHARGE 4 "EMBEZZLEMENT AS DEFINED IN SECTION 5488 REVISED STATUTES OF THE UNITED STATES, IN VIOLATION OF THE 62D ARTICLE OF WAR."

Specification I.— "In that Captain Oberlin M. Carter, Corps of Engineers, United States Army, being the officer in charge for the United States of river and and harbor improvements in the Savannah river and harbor district, and as such officer in charge of said improvements, being a disbursing officer of the United States, and having intrusted to him large amounts of public money of the United States, did wilfully and knowingly apply, for purposes not authorized by law, large sums of the said money so intrusted to him, by wilfully and knowingly causing the amounts hereinafter named to be paid out of the said moneys which were subject to his order and control as such officer in charge of said improvements; the accounts on which the same were paid being false, the amounts paid not being due or owing from the United States to the parties paid, or to anyone, and he, the said Captain Carter, well knowing this to be the case; the said accounts, the amounts paid, and the payment, being those designated by the following voucher (and the entries therein and the endorsements thereon) submitted by the said Captain Carter with his accounts, and marked 'Appropriation for Improving Harbor at Savannah, Georgia.'"

Voucher No. 8, $230,749 90, July, 1897.

"And the one indicated and designated by the following voucher (and the entries therein and the endorsement thereon) submitted by the said Captain Carter with his accounts, and marked 'Appropriation for Improving Cumberland Sound, Georgia and Florida.'"

Voucher No. 9, $345,000, July 1897.

"Each of the said payments having been caused to be made on or about July 6th, 1897, by the said Captain Carter drawing and delivering a check as such officer in charge of river and harbor improvements, by which the payment was ordered and directed to be made out of moneys of the United States under his control as such officer."

See General Orders, Record, pp. 50–52.

The sentence of the Court-Martial was that the accused,

1st. Be dismissed from the military service.

2d. Pay a fine of $5,000.

3d. Be imprisoned at hard labor for a period of five years.

4th. Be degraded by publication of the crime, punishment, his name and place of abode in and about the station and the State from which he came or where he usually resides.

In pursuance of this sentence, the accused,

1st. Has been dismissed from the military service.

2d. Has paid the fine of $5,000.

3d. Is in actual confinement undergoing the imprisonment.

4th. Has been degraded by the publication of the crime.

Turning to the record, it will thus be seen that the accused is charged, first, with the crime of conspiracy to defraud the United States, and the payment of the two checks, one for $230,749.90, and

the other for $345,000, is set out and alleged as two of the overt acts necessary to consummate the crime of conspiracy under the statute. Then, as a separate and distinct offence, under article 60, the petitioner is charged with having caused to be made certain fraudulent claims against the United States, knowing the same to be fraudulent, the claim being represented by these same two checks. Then, under Article 61, he is charged with conduct unbecoming an officer and gentleman by wilfully and knowingly causing to be paid out of the moneys of the United States these same two checks. Then the payment of these same two checks is made again to do duty in the charges and specifications, as an embezzlement of the moneys of the United States by a military officer.

It thus appears that payment of these two checks is made the basis of four distinct and separate offences, and the defendant is convicted of the crime of conspiracy on proof of the payment of these checks, he is convicted of the crime of presenting false and fraudulent claims upon the proof of the payment of these two checks, of conduct unbecoming an officer and gentleman, based upon proof of the payment of these two checks, of embezzlement, based solely upon proof of the payment of these two checks.

The constitutional question sought to be raised and discussed, and to have decided in this case is, whether a man can be, under the military law, four times convicted and punished for the same identical act, and whether a soldier, in time of peace, can invoke the protection of this clause of the Constitution.

The gravity of this question, which we seek here to present, becomes apparent when we refer to a decision, cited by the learned Attorney-General in his brief, delivered by Judge Wallace, who is there quoted as asserting that it is within the power of Congress to declare that the same act shall constitute two separate and distinct criminal

offences for which a soldier may be convicted and punished.

> "It is also proper to state that Congress "can, if it sees fit, carve out two or more "offences from a single criminal transaction, "and impose cumulative punishment for the "different offences (Commonwealth *v.* "Trickey, 95 Mass., 559; United States *v.* "Harmison, 3 Sawyer 556), and if the Court-"Martial convicted the relator of several "offences for a single criminal transaction, it "did not transcend necessarily the power "conferred by the Sixtieth Article of War."
>
> Opinion Wallace, J., Respondent's Brief, p. 19.

It is difficult to conceive of a more important constitutional question than is thus presented in this case. We submit that it is no more within the power of Congress to subject the soldier to be put twice in jeopardy for the same act than a civilian. The same constitutional immunity extends to both citizen and soldier. It is the fundamental right that he possesses as a citizen, and he does not cease to be a citizen when he becomes a soldier.

A writ of habeas corpus was granted by the Circuit Court for the Southern District of New York, which writ was subsequently dismissed, and the prisoner remanded to the custody from which he was produced, in conformity to Rule 34.

Among others, the following assignments of error were filed by the petitioner:

That the Court erred in holding,

(*a*). That the said Oberlin M. Carter was lawfully restrained of his liberty in and by virtue of the said sentence.

(*b*). That the said Oberlin M. Carter was not restrained in his liberty without due process of law as

required by the Constitution of the United States, and that he was not so detained contrary to the provisions of the said Constitution and the laws of the United States.

The petitioner claims that his case is properly in this Court on the ground that it appears upon the face of the record that he has been twice punished for the same offence, and that the second punishment is one inflicted without authority of law and violative of the rights secured to every citizen by the Constitution, that no person shall be twice punished for the same offence.

If it be true that the petitioner is now undergoing a punishment inflicted without authority of law, his right to be discharged upon habeas corpus is established by repeated decisions of this Court.

This proposition we do not understand to be disputed by the brief of the learned Attorney-General; but it is contended that the fact that he is thus being punished without authority of law is not made to appear upon this record, and, therefore, the question cannot be considered by this Court. This, we submit, is a mistake.

Referring to the petition (par. 7, p. 3, fol. 5, of the Record) and to the assignment of errors (p. 42, assignments Nos. 3 and 7, fols. 68 and 69), it will be seen that the fact that the detention of Carter is not authorized by law, and is in violation of the Constitution, is clearly and plainly stated, and is a violation of that provision of the Constitution which is clearly and positively stated.

Even if the petition fails to state in detail all the facts from which it appears that the prisoner is suffering a double punishment for the same offence, any defect in the petition in this respect is supplied by the return to the writ of habeas corpus, in which the whole record of the charges, specifications and sentence is set out. It is wholly immaterial whether a fact necessary to sustain the legal conclusions set out in the petition, that the defendant is being illegally imprisoned, appears in the petition or in the

return. If it appears upon the record and is covered by an assignment of error, then the question is properly before this Court.

This is the rule to be deduced from the authorities cited by the learned Attorney-General.

In Cornell *v.* Greene, 163 U. S., 79, the first case cited by the Attorney-General, it is distinctly stated that when a right, privilege or immunity is claimed under the Constitution, it is sufficient, if a definite issue in respect to the possession of that right, is distinctly deducible from the record. From this record, the right and power of the Court to inflict both fine and imprisonment for the offence charged under the Sixtieth Article of War is directly and necessarily drawn in question.

Argument.

I.

The record expressly shows that this case comes under the provisions of Section 5 of the Act of Congress of March 3d, 1891, and that a question involving the application of the Constitution was directly raised in the court below.

(*a*). The Act of March 3d, 1891, establishing the Circuit Court of Appeals provides as follows:

> "Sec. 5. That appeals or writs of error "may be taken from the District Courts, or "from the existing Circuit Courts direct "to the Supreme Court in the following "cases:
>
> "In any case in which the jurisdiction of "the court is in issue; in such cases the

"question of jurisdiction alone shall be cer-
"tified to the Supreme Court from the court
"below for decision. From the final sen-
"tences and decrees in prize causes. In
"cases of conviction of a capital or otherwise
"infamous crime. In any case that involves
"the construction or application of the Con-
"stitution of the United States. In any
"case in which the constitutionality of any
"law of the United States, or the validity or
"construction of any treaty made under its
"authority is drawn in question. In any
"case in which the Constitution or law of a
"State is claimed to be in contravention of
"the Constitution of the United States.

"Nothing in this act shall affect the juris-
"diction of the Supreme Court in cases ap-
"pealed from the highest court of a State,
"nor the construction of the statute pro-
"viding for review of such cases."

Act of March 3d, 1891, (26 Stat., 826.)

(*b*). In the Circuit Court it was claimed that the accused had been twice punished for the same offence, because Charges I, II and IV covering conspiracy, presenting false claims, and embezzlement, respectively, were punishable ONLY under the 60th Article of War, which prescribes punishment in the alternative by fine *or* imprisonment, and not cumulative punishment by fine *and* imprisonment; that Article 61, under which Charge III, "conduct unbecoming an officer and a gentleman" was laid prescribes punishment by dismissal from the service; and that the 100th Article of War provides for degradation by the publication of the crime, in cases where the accused was found guilty of fraud.

That, therefore, by none of the Articles, under which the offence was properly chargeable, was cumulative punishment by fine *and* imprisonment authorized.

The 62d Article of War, under which Charge IV, embezzlement, was laid, provides for punishment at the discretion of the Court. Under this sweeping provision, if the accused was found guilty of an offence properly chargeable thereunder, the sentence imposed might be justified, as it was broad enough to allow any punishment which the Court-Martial might see fit to inflict.

It was, therefore, contended on behalf of the appellant that although Charge IV was laid under the 62d Article of War, it was not properly chargeable thereunder, but only under the 60th Article of War, which authorizes punishment for a single offence by fine *or* imprisonment, but not by both.

The opinion written by Judge Lacombe of the Circuit Court clearly shows that double punishment for the same offence was the question directly at issue and before him for decision. He states:

> "The contention of the relator is that, "conceding that the Court-Martial had juris- "diction of the person of the accused and of "the offences charged, and conceding fur- "ther the regularity of its proceedings and "the propriety of its findings, it was with- "out power *to impose the four separate pun- "ishments of dismissal, fine, imprisonment "and degradation (special publication of "sentence), although it might have imposed "either one of them.* * * *
>
> "If the relator's premises be sound, viz., "that punishments have been imposed in "the aggregate when the statute authorized "their imposition only in the alternative, his "conclusion is supported by high authority "(*ex parte* Lange, 85 U. S., 163). In that "case it was held that when a Court has im- "posed fine and imprisonment where the "statute only conferred power to impose by "fine or imprisonment, and the fine has "been paid and the judgment of the Circuit "Court thus executed so as to be a full sat

"isfaction of one of the alternative penalties
"of the law, the power of the Court as to
"that offence is at an end.

"The important question in the case,
"therefore, is whether, under the statutes
"of the United States, the Court-Martial had
"the power under its findings to impose a
"sentence including these four penalties."

See Opinion Lacombe, Circuit Judge,
page 36, folios 57-58.

It is true the argument was based upon the provisions of the Articles of War, and in that sense the construction of the statute was in question.

Whether the sentence was imposed under a statute which authorized the punishment prescribed, or under an erroneous construction of that statute, is immaterial; because, if the effect of the sentence is to twice punish for the same offence, to quote Mr. Justice Bradley, "It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights than an unconstitutional conviction and punishment under a valid law."

Ex parte Neilsen, 131 U. S., 176.

Conceding, then, that the contention of the appellant was based upon a construction of the Articles of War, the *point* in the argument was that the constitutional provisions against a double punishment for the same offence had been violated in this case, because all of the inter-included charges were based upon a single alleged criminal transaction, and that, in order to justify the sentence, at least one presentation of the offence must have been properly punishable under a statute broad enough to justify the sentence imposed; that the 62d Article of War was the only one which would have justified the sentence, but

that none of the charges was properly laid under that Article, because the presentation of the offence as charged under Charges I, II, and IV were specifically provided for under the 60th Article of War, and the presentation of the offence charged under Charge III was specifically provided for under the 61st Article of War; that the 62d Article of War was a "catch-all" clause granting jurisdiction to try and punish *only* for offences not properly chargeable under the other articles. This has been the contention of the appellant from the start, and the one which was urged at the Circuit Court and the Circuit Court of Appeals.

Besides, the Assignments of Error filed put at rest any doubt as to the provisions of the Constitution having been invoked in this case.

Error was assigned on the specific ground that the Court erred in holding that the said Oberlin M. Carter was lawfully restrained of his liberty in and by virtue of the sentence of the Court-Martial, and that he was not so detained contrary to the provisions of the Constitution and of the laws of the United States.

See Assignments of Error, page 42, folio 68.

If the appellant's contention (that the offences with which the accused was charged are based upon a single criminal transaction) be correct, it necessarily follows that the provisions of the Constitution have been violated by the sentence in this case.

That the Court will upon habeas corpus inquire whether the accused has been twice punished for the same offence, and, if so, discharge the prisoner, is fully supported by the decisions of this Court.

Ex parte Neilsen, 131 U. S., 176.
Ex parte Snow, 130 U. S., 274.
Coffey *v.* U. S., 116 U. S., 436.
U. S. *v.* Chouteau, 102 U. S., 603.
Ex parte Lange, 85 U. S., 163.

The record in this case then clearly discloses that the provisions of the Constitution were directly invoked in the Circuit Court, and that the application of those provisions to this case was the question directly in issue.

II.

The accused in no way waived his right of review by this Court by the appeal to the Circuit Court of Appeals.

There is nothing in the record before this Court on this motion to show that this case was ever before the Circuit Court of Appeals.

If, however, this Court shall consider that the effect of an appeal to that Court in this case is properly before them, then we respectfully submit, no waiver of the right to review by this Court can be predicated on the hearing and determination by the Circuit Court of Appeals.

(*a*). In the case of Pullman Palace Car Company against Central Transportation Company (171 U. S., 138) this Court expressly held that the right to appeal directly to this Court from the Circuit Court because of a constitutional question is not waived by taking an appeal also to the Circuit Court of Appeals.

Mr. Justice Peckham, speaking for this Court, said:

> "Counsel for the Pullman Company took
> "the appeal directly from the Circuit Court
> "to this Court on the theory that the case
> "involved the construction or application of
> "the Constitution of the United States, be-
> "cause of the holding of the Court below

> " that the cause of action alleged by the
> " Central Company in its cross bill was, un-
> " der the circumstances, a proper subject of
> " equitable cognizance, and counsel claimed
> " it was really nothing but a legal cause of
> " action, in regard to which the cross defend-
> " ant was entitled to a trial by jury under
> " the Constitution of the United States.
> " There being room for doubt in regard to
> " the soundness of such contention, the
> " counsel also took an appeal to the Circuit
> " Court of Appeals, *and we think that by this*
> " *action he did not waive any right of ap-*
> " *peal which he would otherwise have had.*
> " Whichever route may be the correct one,
> " either directly from the Circuit Court or
> " through the Circuit Court of Appeals, it is
> " unnecessary to decide, because the case is
> " now properly before us either by appeal or
> " by the writ of certiorari; and we, there-
> " fore, proceed to determine it upon the
> " merits."
>
> Pullman's Palace Car Co. *v.* Central Transportation Co., 171 U. S., 138.

In that case, it is true, there was no decision upon the merits by the Circuit Court of Appeals. Nor was there any decision as to the application of the Constitution by the Circuit Court of Appeals in the case at bar.

The learned Judge of that Court writing the opinion seems to have based it upon the following grounds:

1st. That upon habeas corpus the Court cannot look into the record for the purpose of ascertaining whether two or more alleged offences were, in fact, but one and the same criminal act.

2d. That as two of the charges, namely, conspiracy and presenting false claims, were properly

chargeable under the 60th Article of War, which allows punishment by fine or imprisonment for each offence therein enumerated, the punishment in this case by fine and imprisonment was authorized, because the accused had been found guilty of, at least, two of the offences therein enumerated.

It will thus be seen that the Circuit Court of Appeals did not pass upon either one of the two following questions:

1st. That the four different presentations of the offence charged were based upon and included under one and the same criminal act.

2d. That the offence of embezzlement under Charge IV was not properly laid under the 62d Article of War, but should have been laid under the 60th Article of War.

Judge Wallace distinctly says, in his opinion, that neither one of those questions was considered:

> " Whether the specifications support the
> " charges or the evidence supports the speci-
> " fications we are not at liberty to consider.
> " *Nor is it open to inquiry whether the two*
> " *offences were, in fact, but one and the same*
> " *criminal act.*" * * * " In dismissing the
> " writ, the Court below expressed the opinion
> " that the relator was properly convicted by
> " the Court-Martial of an offence in violation
> " of the 62d Article of War, and that the
> " sentence of imprisonment was supported
> " by such conviction. Without intending to
> " impugn the correctness of this conclusion
> " *we have not considered the question* be-
> " cause, in the view we have reached, it does
> " not arise."

See Opinion Wallace, J., pages 18-20, Respondent's Brief.

The principal questions in this case, viz., that the four charges were based upon and included under one and the same criminal act, and that there was no statute under which any one of the presentations of the offence was properly chargeable, which authorized the sentence inflicted, were thus not passed upon, but on the contrary, were entirely ignored by the Circuit Court of Appeals, and its decision, placed upon entirely different and minor grounds, must of necessity fall if the controlling constitutional point be well taken.

(*b*). The decision of this Court in Robinson *v.* Caldwell (165 U. S., 359) is clearly distinguishable from the case at bar.

In that case, while it appears from a report of the decision, that the constitutionality of the act of Congress of March 3d, 1873, was drawn in question, and that also the construction of a treaty made between the government and the Nez Percé Indians was involved, the question presented to this Court upon the appeal, *was simply as to the jurisdiction of the Circuit Court*, the contention being that the plaintiff could not have brought an original suit in the Circuit Court of the United States, and, therefore, that the case was not removable from the State Court where it was originally commenced.

In that case, too, the Circuit Court of Appeals directly passed upon the constitutionality of the act in question, as well as the construction of the treaty involved.

This Court said that as the whole case, *on its merits*, had been determined by the Circuit Court of Appeals, the appeal to this Court direct from the Circuit Court *on the ground that the jurisdiction of the Circuit Court was in question*, could not be maintained.

The question of jurisdiction, on removal from a State Court, may very properly be considered as collateral to the controversy involved in the action itself, and that by submitting to the jurisdiction of

the Circuit Court and to the Circuit Court of Appeals, the defendant waived his right to raise the question of jurisdiction.

It was not decided in the Robinson case that the appeal could not have been maintained if the question presented to this Court was the constitutionality of the act of Congress or the question of the treaty involved.

In the case at bar the application of the Constitution is the question directly presented upon this appeal, and that question has not been determined or passed upon by the Circuit Court of Appeals, but, on the contrary, was not even examined by the Court, although raised and argued in that Court.

Nor does the case of Columbus Construction Company *v.* Crane Company (174 U. S., 600) in any way preclude the maintenance of this appeal.

In that case the appeal was taken to this Court while the case was still pending before the Circuit Court of Appeals, and this Court said that it was not in accordance with orderly practice that separate appeals or writs of error on the merits in the same case should be pending at the same time in two appellate courts.

> Columbus Construction Co. *v.* Crane Construction Co. (*supra*).

In the case at bar, the appeal and writ of error in the Circuit Court of Appeals has been finally disposed of.

This case, it is therefore respectfully submitted, comes directly under the decision of this Court in the Pullman Palace Car Company case (*supra*), and is clearly distinguishable from the two cases last above referred to.

(*c*). The motion to dismiss the appeal should, therefore, be denied.

1st. Because this case is directly within the provisions of Section 5 of the Act of March 3d, 1891,

allowing an appeal direct to this Court in a case where the application of the Constitution of the United States has been invoked.

2d. Because, by the record, it clearly appears that the application of the Constitution was the question at issue before the Circuit Court.

3d. Because even if a determination of the *whole case upon the merits* by the Circuit Court of Appeals be held to be a waiver of the right to appeal to this Court, that rule has no application to the case at bar, because the Circuit Court of Appeals did not determine the controlling constitutional question, but, on the contrary, affirmed the order appealed from without examining or passing upon the question of the application of the Constitution.

III.

If this Court shall hold that it has jurisdiction of the appeal, it is submitted, a full argument of the questions involved should be granted for the reasons stated in the briefs submitted on the behalf of the appellant, on the motion for a writ of certiorari from this Court to the Circuit Court of Appeals.

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